IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE CITY OF SEATTLE, APPELLANT,
vs.
JOHN W. THOMPSON, RESPONDENT.

No. 274.

BRIEF ON MOTION TO DISMISS

The motion to dismiss is based upon the alleged want of jurisdiction of this Court to hear the appeal, and is based upon the record and upon the affidavit of the administrator of John W. Thompson, deceased, filed in this cause. The motion is made by Daniel Kelleher, as administrator of Thompson, deceased. Kelleher seeks to limit his appearance solely for the purpose of the motion. It appears from the statement in the brief of Kelleher that Thompson died on the 11th day of July, 1901; that he, Kelleher, was appointed administrator on the 6th day of August of the same year, and that he has ever since been administrator of the estate in the State of Washington.

The brief of Kelleher presents the anomoly of a person not a party to a proceeding seeking to have the proceeding dismissed.

The motion to dismiss does not point out the particular facts in which the want of jurisdiction appears, but simply contents himself with asking the Court to dismiss the case for want of jurisdiction; such is not a sufficient specification of the ground upon which a motion may be based. It is necessary that a motion should specify particularly the grounds relied upon.

We are unable to find anything in the rules of this Court, or in the law applicable thereto, entitling one to make a special appearance. Mr. Kelleher has either appeared in this Court or he has not. If he has appeared, it is by reason of being a representative of the deceased, and his appearance dispenses with the necessity of taking the steps required by rule 15 of this Court. He becomes a party by his own voluntary act, and he cannot voluntarily submit himself to the jurisdiction of this Court and ask the Court to dismiss the appeal, because he has not properly been brought into the Court. If he desired to move to dismiss the appeal, he should have waited until he had been properly made a party and then would have been the proper time to make such motion. Under subdivision 2 of Rule 15, the action will not abate until the 10th day of the second term next succeeding the suggestion of the death.

The citation on appeal in this case was served upon Daniel Kelleher, who, it appears, had been one of the attorneys for the complainant, since deceased, in this cause. (Printed Transcript, pp. 5-6.) At the time of such service Daniel Kelleher was the administrator of said deceased. So it appears that the service of the citation was made upon one of the proper representatives of the de-

ceased, although no formal order of substitution had been made. The fact that the citation was addressed to the deceased is an irregularity which is not fatal to the appeal.

Bigler vs. Waller, 12 Wall. 142.

An appeal in an equitable cause is different from a writ of error. The latter is considered in the light of a new suit; the former is a continuation of the old case. Under the rule of this Court, substitution of the representatives of the deceased and the revival of the cause is made as a matter of course upon proper suggestion by the appellant. Simultaneously with the filing of this brief, appellant files its suggestion of the death of Thompson, the appointment of Kelleher as administrator for the State of Washington, and the trusteeship of the American Security & Trust Company, and moves this Court that the cause may be revived and these representatives substituted, in case they do not voluntarily become parties. For the convenience of the Court, we print herein copy of said suggestion and motion:

Comes now the appellant, The City of Seattle, and respectfully represents to this Court as follows:

I.

That the decree rendered in the United States Circuit Court, for the District of Washington, Northern Division, in the above entitled Court, was duly signed and filed in said Circuit Court on the 22nd day of June, 1901.

II.

That the defendant and appellee in this cause, John W. Thompson, died on the 11th day of July, 1901, leaving a will, by which the American Security & Trust Company

of the District of Columbia, was created and ever since has been the duly qualified and public trustee of his estate.

III.

That on or about the 6th day of August, 1901, Daniel Kelleher, a citizen of the State of Washington, and residing in King County in said State, was duly appointed administrator of the estate of the said John W. Thompson, deceased, by the Superior Court of the State of Washington, King County, and thereupon duly qualified as such administrator, and ever since has been and now is the duly appointed, qualified and acting administrator of the estate of John W. Thompson, deceased, in the State of Washington.

NOW, THEREFORE, in consideration of the premises, the above named appellant, the City of Seattle, respectfully moves this Honorable Court that an order be entered herein, that unless the said representatives of the said John W. Thompson, deceased, voluntarily become parties to this appeal within the first ten days of the next ensuing term of this Court, a copy of such order be printed in some newspaper of general circulation in the State of Washington, from which the above entitled cause is brought, for three successive weeks, and at least six days before the next ensuing term of this Court.

WALTER FULTON,
Attorney for Appellant.

MITCHELL GILLIAM,
Corporation Counsel for the City of Seattle.
Of Counsel.

The foregoing motion is duly verified by the Mayor of the City of Seattle.

The voluntary appearance of Kelleher as adminis-

trator upon his own suggestion of the death of the appellee has probably rendered this motion unnecessary, but we have made it in order to do whatever was in our power to maintain this appeal. It is a matter of considerable consequence, and proceedings in this case have been somewhat hampered by the death of the attorney who originally instituted this proceeding, and we believe for the reasons above stated, that the appeal should not be dismissed upon this motion.

WALTER FULTON.
Attorney for Appellant.

MITCHELL GILLIAM.
Of Counsel.